Mills Oakley
ABN: 51 493 069 734

16 October 2016

Your ref:
Our ref: AXGS/3194015

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Partner
Aaron Gadiel +61 2 8035 7858
Email: agadiel@millsoakley.com.au

Goldcoral Pty Ltd
PO Box 3441
AUSTRALIA FAIR QLD 4215

By email: graeme@inglesgroup.com.au

Attention: Graeme Ingles

Dear Graeme

Advice re DA2015/0096, Iron Gates Drive, Evans Head

You have asked me provide advice in answer to two questions:

- **Question 1:** Can you seek approval for the carrying out works within the road reserve for Iron Gates Drive as part of the existing development application?
- **Question 2:** Is there any relevance, in planning law, to the fact that the construction of the existing road within the road reserve has never been formally 'accepted' by the Council as an asset?

Summary advice

In our opinion:

- You can seek approval for the carrying out works within the road reserve as part of the existing development application.
- However, you will also need approval under section 138 of the *Roads Act 1993*. This means that you should also lodge a concurrent 'section 138', and ask the Council to determine both applications together. If the Council does this, no separate 'Part 5 assessment' is required.
- The road is part of, or is attached to, Council's land, and Council therefore owns the road.
- There is no relevance, in planning law, to the fact that the construction of the existing road within the road reserve has never been formally 'accepted' by Council as an asset.

Background

We understand and assume the relevant facts to be as follows:

- You are the developer of land located on Iron Gates Drive, Evans Head. The land is legally described as Lot 163 DP 831052, Lot 276 DP 755624 and Lot 277 DP 755624 (**the site**).
- The site is located approximately 1.5 kilometres from the existing Evans Head township. It is adjacent to the Evans River.
- Development application DA2015/0096 (**the development application**) has been lodged with the Richmond Valley Council (**the Council**).
- The development application is for:
  - subdivision of the land to create 176 residential allotments; and

- subdivision works, including the construction of roads, earthworks, drainage work, the construction of utility services, landscaping, revegetation and rehabilitation.

- The site is bush fire prone land.

- The development application has been lodged as an 'integrated development' due (at least in part) to obtain general terms of approval from the Rural Fire Service (as a bushfire safety authority will be required under section 100B of the *Rural Fires Act 1997*).

- None of the land within the road reserve for Iron Gates Drive (**the road reserve**) has been mapped under the *State Environmental Planning Policy No 26—Littoral Rainforests*.

- You have provided us with various maps that have been given to you by the Council. You have accepted these maps as being accurate (in the sense that they represent the correct maps). These maps show that parts of the road reserve are mapped under (and trigger the provisions of) the *State Environmental Planning Policy No 14—Coastal Wetlands* (**SEPP 14**).

- In order to implement a bushfire safety authority, you will need to upgrade Iron Gates Drive (being the road that connects your site to the existing urban area of Evans Head). There is no other road access proposed for your site.

- This work will involve (along the whole stretch of the road, other than the mapped SEPP 14 areas):

  - clearing the full road width (20 metres) of vegetation/trees (generally native plants);

  - widening the existing 6 to 6.5 metre pavement (ie the carriageway for vehicles) to 8 metres;

  - installing traffic management devices, such as reflective road markers and (in some locations) signage.

  This work is called the **external roadworks** in this advice.

- The road reserve is entirely contained within the 'E3 Environmental Management' zone (**E3 zone**) under the *Richmond Valley Local Environmental Plan 2012* (**the LEP**).

- On 30 August 2016 an officer of the Council emailed you and informed you that:

  > Richmond Valley Council is the roads authority for the road, however, all construction within the road has never been formally accepted by Council as an asset.

Please tell us if any of the above facts are not correct, as it may change our advice.

Detailed advice

1. Can you seek approval for the carrying out works within the road reserve as part of the existing development application?

1.1 A development consent may authorise both principal works on freehold land and roadworks on a public road reserve necessary for the use of the principal land (*Boral Resources (NSW) Pty Ltd v Wingecarribee Shire Council* [2003] NSWLEC 39 [60]).

1.2 Clause 49(1)(b) of the *Environmental Planning and Assessment Regulation 2000* requires that a development application can only be made with the consent in writing of the owner of the subject land.

1.3 The owner of a public road is taken to be the roads authority (section 145 of the *Roads Act 1993*). In this case, the roads authority is the Council.

1.4 The Court of Appeal has said that a development application could be made without any advance consent from the Council, as landowner. If the Council, as consent authority, approves the development application it also necessarily consenting to the application (under the planning law) as owner of the land (*Sydney City Council v Claude Neon Ltd* (1989) 15 NSWLR 724, 731, per Hope JA).

1.5 It also does not matter whether the development consent is granted by the Council itself or the Northern Region Joint Regional Planning Panel. This is because the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) says that when exercising this function the panel is taken to be the Council (section 23G(5A)).

1.6 In order for the works to be carried out, it will also be necessary for you to secure the consent of the Council under section 138 of the *Roads Act 1993*. However, you can seek this consent concurrently with your development application (see for example*: The Northern Eruv v Ku-ring-gai Council* [2012] NSWLEC 1058; cf *Australian Leisure and Hospitality Group Pty Ltd v Manly Council (No 4)* [2009] NSWLEC 226 [9]-[10]).

1.7 If you obtain authorisation for the roadworks via a consent to your development application, when the Council separately consents under section 138 of the *Roads Act 1993*, it will **not** be required to carry out a Part 5 assessment (section 110(1)(g) and section 111(1) of the EP&A Act).

1.8 In short, we believe that you can seek approval for the carrying out works within the road reserve as part of the existing development application. However, you will also need approval under section 138 of the *Roads Act 1993*. This means that you should also lodge a concurrent 'section 138' application, and ask the Council to determine both applications together. If the Council does this, no separate 'Part 5 assessment' is required.

2. Is there any relevance, in planning law, to the fact that the construction of the existing road within the road reserve has never been formally 'accepted' by Council as an asset?

2.1 The owner of a public road reserve is taken to be the roads authority (section 145 of the *Roads Act 1993*).

2.2 This means that any physical alterations that are made to the surface of the road reserve are alterations that are made to the Council's property.

2.3 Similarly, anything attached to land to further the use to which the land may be put is a fixture. A fixture of this kind becomes part of the land at the time of being attached: *Reid v Smith* (1905) 3 CLR 656, 680-681.

2.4 Either way, the existing road constructed within the public road reserve is the Council's property. The road is part of, or is attached to, Council's land, and Council therefore owns the road.

2.5 In our opinion, there is no relevance, in planning law, to the fact that the construction of the existing road within the road reserve has never been formally 'accepted' by Council as an asset.

Please do not hesitate to contact me on (02) 8035 7858 if you would like to discuss this advice.

Yours sincerely

Aaron Gadiel
Partner
Accredited Specialist - Local Government and Planning

Mills Oakley
ABN: 51 493 069 734

23 October 2016

Your ref:
Our ref: AXGS/3194015

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PO Box H316
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Partner
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Email: agadiel@millsoakley.com.au

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AUSTRALIA FAIR QLD 4215

By email: graeme@inglesgroup.com.au

Attention: Graeme Ingles

Dear Graeme

Advice re DA2015/0096, Iron Gates Drive, Evans Head

You have asked me provide advice in answer to this question: Is it in order to trim the overhang over the road reserve in the SEPP 14 areas?

State Environmental Planning Policy No 14—Coastal Wetlands (**SEPP 14**) requires a development application to be lodged, etc when you propose to 'clear ' mapped SEPP 14 land.

However, clause 7(4) defines 'clearing' to be:

> the destruction or removal in any manner of native plants growing on the land.

If your trimming does not involve the destruction or removal of any native plants, we do not consider that SEPP 14 will be triggered.

Furthermore, reinforcing our view above, we consider that such trimming would be 'routine maintenance works' under clause 94(2)(b) of the *State Environmental Planning Policy (Infrastructure) 2007* (**the Infrastructure SEPP**). This means that, if:

- it is carried out by or on behalf of the Council; and
- the extent of the activity (and any associated adverse impacts) is kept to the minimum possible to allow safe use of the road,

development consent will not be required.

If it can be established that the pruning would not otherwise require development consent or a permit under the local LEP (consult your town planner on this) then the activity may be (if carried out for or on behalf of the Council) be exempt development under clause under clause 97(1)(f) of the Infrastructure SEPP. This would definitively remove the need for a review of environmental factors if the requirements of clause 20 of the Infrastructure SEPP are adhered to.

Of course, you do not own the road reserve. This means that the only lawful way that you could prune the trees overhanging the road reserve is if you were doing it with the consent of Council.

Ordinarily, the terms of that consent would, in our view, have the effect that you were carrying out the work **on behalf of** the Council. This is because there needs to be some element of control, supervision or direction on the part of the public authority in order for the work to qualify as being carried out on its behalf (*Citizens Airport Environment Association Inc v Maritime Services Board* (1993) 30 NSWLR 207, 240-241). Typically we expect that a consent will give the Council that degree of control, etc. This control — combined with the fact that the work is taking place on Council's land and will benefit the Council as

the roads authority — is normally sufficient. Legally, it does not matter that the work may also benefit you, or be in your interest.

Please do not hesitate to contact me on (02) 8035 7858 if you would like to discuss this advice.

Yours sincerely

Aaron Gadiel
Partner
Accredited Specialist - Local Government and Planning

Mills Oakley
ABN: 51 493 069 734

5 March 2019

Your ref:
Our ref: AXGS/3194015

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Attention: Graeme Ingles

Dear Graeme

Advice re DA2015/0096, Iron Gates Drive, Evans Head — query raised by the Council

You have asked me provide advice in response to the following statement by Richmond Valley Council (**the Council**) in an email from Tony McAteer to your town planner on 6 December 2018:

> I believe …[Mills Oakely's] legal … [advice of 26 December 2016] on the access road is flawed as it relies [on] the fact that the road was Gazetted after the Lawrence Wilson case. However, the road was Gazetted on 4 June 1993 which was [a] long time before the Lawrence Wilson orders were handed down by the Court on 5 December 1996.

Our legal advice on 26 December 2016 was not flawed. However, it was drafted without knowledge of the actual date on which the deviated area was gazetted as a public road. The Council has now supplied that date. We have confirmed — through our own enquiries — that the date is accurate.

This additional factual knowledge does not change any of the material conclusions of our advice of 26 December 2016. This letter re-explains our reasoning and conclusions, in the context of the gazettal date of 4 June 1993.

In our opinion:

- The Land and Environment Court has **not** ruled that the current location of Iron Gates Drive (in the deviated area) is unlawful. What was ruled to be unlawful was the process of the construction of those sections of the road.
- The Court did not set aside the notification the declaration of the deviated area as a public road, published in the NSW Government Gazette on 4 June 1993. That is, the legal status of the land as a public road remained intact.
- There are no provisions of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**) which require a consent authority to assess the impacts of development on land against a different baseline, merely because the form of the land was unlawfully changed in the past.
- The Council has now, as roads authority, been responsible for the upkeep of the road for at least 16 years. Accordingly, any current deficiencies in the road are unlikely to have anything to do with the circumstances of its unlawful construction. Any present day deficiencies in the road will simply form part of the normal merit assessment of any relevant development application (or Part 5 assessment) and should be dealt with accordingly (for example, by way of a condition requiring that an identified deficiency be dealt with).

Background

We understand and assume the relevant facts are as per our letter of advice dated 26 December 2016, taking into account that the gazettal date of the deviated road was 4 June 1993.

Please tell us if any of the above facts are not correct, as it may change our advice.

Detailed advice

1. *Wilson v Iron Gates Pty Ltd*

1.1 The Land and Environment Court has not ruled that the current location of Iron Gates Drive (in the deviated area) is unlawful

1.2 What was ruled to be unlawful was the **process** of the **construction** of those sections of the road.

1.3 This is clear from the following statements made in the *Wilson v Iron Gates Pty Ltd* (Unreported, Land and Environment, Stein J, 2 December 1996, Proceedings 40172 of 1996) (**the substantive judgment**) at pages 13-18:

> In my opinion, the evidence demonstrates that the road **has been constructed (and continues to be constructed)** in a location different from that approved by the consent. …
>
> In my view, the road, in so far as it is being built outside Lot 1 in DP 47879, **is presently being constructed in breach of the Act** since no consent has been given to its construction in that location. …
>
> [I]t is appropriate to make the following declarations: …
>
> - that **construction of the access road, and its use**, on any parts of Lots 1, 2 and 3 DP 823583, in so far as any such construction is outside of Lot 1 DP 47879, is unlawful …
> - that the **carrying out of construction works** on any parts of Lots 1,2 and 3 DO 832583 as fall outside of Lot 1 DP 47879 is in breach of Development Consent No. 110/88 (bold added).

1.4 The sealed orders that were made three days after the substantive judgement relevantly say the following:

> **Works** of clearing formation and **construction** of an access road, on those parts of Lots 1, 2 and 3 in DP 823583, as lie outside of the boundaries of Lot 1 in DP 47879, and the use thereof as an access road, are unlawful. …
>
> **The carrying out of works** of clearing, formation and construction of an access road on any part of Lots 1, 2 and 3 in DP 823583 as lie outside of the boundaries of Lot 1 DP 47879 and the use thereof as an access road are in breach of the Development Consent …
>
> The **First Respondent** [being Iron Gates Pty Ltd] be restrained from using as an access road to and from Portions 276 and 277 … any part of Lots 1, 2 and 3 DP 823583 in so far as any such use is outside of the boundaries of Lot 1 DP 47879 without obtaining prior approval in accordance with the Environmental Planning and Assessment Act, 1979 (bold added).

1.5 It should be noted that nothing in the judgment or the orders says that the road itself is unlawful, merely that its **construction and 'use'** are unlawful.

1.6 The Court **did not** set aside the notification the declaration of the deviated area as a public road, published in the NSW Government Gazette on 4 June 1993. That is, the legal status of the land as a public road remained intact. No orders were made against the Council. No orders were made against members of the public.

1.7 As result, sections 5 and 6 of the *Roads Act 1993* — which confer rights of access and passage on members of the public and adjoining landowners — continued to apply to the road, including the deviated area. The **only** exception was in relation to Iron Gates Pty Ltd — whose rights under section 6 of the *Roads Act 1993* were effectively overridden by

the Court order. This aspect f the matter is of academic interest only as **Iron Gates Pty Ltd no longer exists.**

2. *Wilson v Iron Gates Pty Ltd and Richmond River Shire Council*

2.1 The status of the Iron Gates Road as a lawfully gazetted public road was acknowledged in *Wilson v Iron Gates Pty Ltd and Richmond River Shire Council* (Unreported, Land and Environment, Lloyd J, 4 March 1998, Proceedings 40172 of 1996) (**the remediation judgement**).. This judgment said the following:

> [19] … If the Court were to insist on the road following the approved route then it would have a greater impact than if it were to allow the road to remain in its present location. …
>
> [20] … It seems to me, however, that greater harm would be caused to the environment by now insisting that the road follow the approved route and remediating the area occupied by those parts of the road which lie outside the approved route. …
>
> [23] … In the present case the road is largely completed. The applicant only seeks the remediation of those parts of the road which lie outside the approved route. A consequence of the orders sought by the applicant would be that those sections of the road which lie within the approved route would remain. This would lead to the absurd consequence that there would remain three lengths of road, each a few hundred metres long, unconnected to each other and leading nowhere. This absurd result should, in my view, be avoided. Although there is no consent for a subdivision of the Iron Gates Estate, that land remains zoned for residential purposes. There is, as far as I am aware, no proposal to change that zoning. It is thus possible that at some time **in the future a development application may be made** to develop the Iron Gates Estate for residential purposes. **The subject road is the access road to that land. The subject road would thus appear to have some potential utility**. …
>
> [25] … A final consideration is the fact the final route of the road is now a public road under the *Roads Act* 1993. lthough the rights conferred on the public under that Act are subject to such restrictions as are imposed by or under any other Act or law**, the fact that the construction of parts of the subject road are unlawful as being contrary to the *Environmental Planning and Assessment Act* is not sufficient, in the circumstances of this case, to deny the public's right to now pass along the public road** (bold added).

2.2 It is clear that the Court anticipated that the gazetted public road would be put to use for the purposes of accessing the 'Iron Gates Estate'.

3. No EP&A Act restriction on the utilisation of unlawful works

3.1 The formation of the road itself is either a work that has changed the nature of the land and/or involves the installation of fixtures that have become part of the land. Either way, what was unlawful was the **manner** in which the land was changed and any fixtures were installed.

3.2 There are no provisions of the EP&A Act which require a consent authority to assess the impacts of development on land against a different baseline, merely because the form of the land was unlawfully changed in the past.

3.3 Any attempt to imply such a provision into the EP&A Act would lead to absurd results. This is because consent authorities and present-day landowners are generally ignorant of the nature and lawfulness of historical works on any given parcel of land when development applications are lodged and assessed. It would be entirely impracticable for a consent authority (or proponent) to be under a duty to establish a notional baseline, that reflected the form of the land absent all unlawful works.

3.4 Our view on this point is consistent with the established body of case law.

3.5 In *Hooper v Lucas* (1990) 71 LGERA 27 it was common ground that a building permit for the erection of decking and fencing approved the erection of building works upon and over a building which was **in part**:

(a) unauthorised; and

(b) erected in contravention of the provisions of the then *Local Government Act 1919* (under a building control regime that now forms part of the EP&A Act).

3.6 The Court said that it was open to the council to approve a building application for the erection of a new building despite the fact that that the works incorporated a building that had been previously unlawfully erected. (This type of 'building application' is the equivalent of a modern day development application.)

3.7 The Court explicitly rejected an argument that the Council could not entertain an application to alter or add to an unauthorised structure. In saying this the Court accepted that the council had no power to receive and consider a building application (now a development application) merely to grant a building permit (now a development consent) to **retrospectively** authorise a building that had been already erected.

3.8 This decision has been applied by the Land and Environment Court in the modern legislative context: *Rancast Pty Ltd v Leichhardt Council* (1995) 89 LGERA 139, 143-144; *Dennis Foster Insurance Brokers Pty Ltd v Sydney City Council* [1999] NSWLEC 53 at [26]-[27]; *Silverwater Estate Pty Ltd v Auburn Council* [2001] NSWLEC 60 at [74]; *Mirzikinian v Mosman Municipal Council* [2004] NSWLEC 288 at [21].

3.9 However, if a consent authority cannot be satisfied that a work — in its present state — is safe and suitable for use it may refuse a development application that relies on that work (*Dennis Foster Insurance Brokers* at [26]-[27]). The absence of the normal statutory approvals for a pre-existing work may legitimately cause the consent authority to be concerned in the safety and reliability of the work. In **that** sense, the fact that work has been carried out without approval **may** be a relevant matter in development assessment.

3.10 **However**, there is no suggestion in either the substantive judgment or the remediation judgment that the Iron Gates Drive has been constructed anything other than in a manner that makes it suitable for use by the public.

3.11 It is not presently clear precisely when the Council became the roads authority. However, it occurred prior to May 2003. We say this because the public road was given the name Iron Gates Drive by the Council via a notice published in the NSW Government Gazette on 2 May 2003.

3.12 The Council has now, as roads authority, been responsible for the upkeep of the road for at least 16 years. Accordingly, any current deficiencies in the road are unlikely to have anything to do with the circumstances of its unlawful construction. Any present day deficiencies in the road will simply form part of the normal merit assessment of any relevant development application (or Part 5 assessment) and should be dealt with accordingly (for example, by way of a condition requiring that an identified deficiency be dealt with).

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In our opinion:

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- The Court did not set aside the notification the declaration of the deviated area as a public road, published in the NSW Government Gazette on 4 June 1993. That is, the legal status of the land as a public road remained intact.
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2.1 The status of the Iron Gates Road as a lawfully gazetted public road was acknowledged in *Wilson v Iron Gates Pty Ltd and Richmond River Shire Council* (Unreported, Land and Environment, Lloyd J, 4 March 1998, Proceedings 40172 of 1996) (**the remediation judgement**).. This judgment said the following:

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2.2 It is clear that the Court anticipated that the gazetted public road would be put to use for the purposes of accessing the 'Iron Gates Estate'.

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3.1 The formation of the road itself is either a work that has changed the nature of the land and/or involves the installation of fixtures that have become part of the land. Either way, what was unlawful was the **manner** in which the land was changed and any fixtures were installed.

3.2 There are no provisions of the EP&A Act which require a consent authority to assess the impacts of development on land against a different baseline, merely because the form of the land was unlawfully changed in the past.

3.3 Any attempt to imply such a provision into the EP&A Act would lead to absurd results. This is because consent authorities and present-day landowners are generally ignorant of the nature and lawfulness of historical works on any given parcel of land when development applications are lodged and assessed. It would be entirely impracticable for a consent authority (or proponent) to be under a duty to establish a notional baseline, that reflected the form of the land absent all unlawful works.

3.4 Our view on this point is consistent with the established body of case law.

3.5 In *Hooper v Lucas* (1990) 71 LGERA 27 it was common ground that a building permit for the erection of decking and fencing approved the erection of building works upon and over a building which was **in part**:

(a) unauthorised; and

(b) erected in contravention of the provisions of the then *Local Government Act 1919* (under a building control regime that now forms part of the EP&A Act).

3.6 The Court said that it was open to the council to approve a building application for the erection of a new building despite the fact that that the works incorporated a building that had been previously unlawfully erected. (This type of 'building application' is the equivalent of a modern day development application.)

3.7 The Court explicitly rejected an argument that the Council could not entertain an application to alter or add to an unauthorised structure. In saying this the Court accepted that the council had no power to receive and consider a building application (now a development application) merely to grant a building permit (now a development consent) to **retrospectively** authorise a building that had been already erected.

3.8 This decision has been applied by the Land and Environment Court in the modern legislative context: *Rancast Pty Ltd v Leichhardt Council* (1995) 89 LGERA 139, 143-144; *Dennis Foster Insurance Brokers Pty Ltd v Sydney City Council* [1999] NSWLEC 53 at [26]-[27]; *Silverwater Estate Pty Ltd v Auburn Council* [2001] NSWLEC 60 at [74]; *Mirzikinian v Mosman Municipal Council* [2004] NSWLEC 288 at [21].

3.9 However, if a consent authority cannot be satisfied that a work — in its present state — is safe and suitable for use it may refuse a development application that relies on that work (*Dennis Foster Insurance Brokers* at [26]-[27]). The absence of the normal statutory approvals for a pre-existing work may legitimately cause the consent authority to be concerned in the safety and reliability of the work. In **that** sense, the fact that work has been carried out without approval **may** be a relevant matter in development assessment.

3.10 **However**, there is no suggestion in either the substantive judgment or the remediation judgment that the Iron Gates Drive has been constructed anything other than in a manner that makes it suitable for use by the public.

3.11 It is not presently clear precisely when the Council became the roads authority. However, it occurred prior to May 2003. We say this because the public road was given the name Iron Gates Drive by the Council via a notice published in the NSW Government Gazette on 2 May 2003.

3.12 The Council has now, as roads authority, been responsible for the upkeep of the road for at least 16 years. Accordingly, any current deficiencies in the road are unlikely to have anything to do with the circumstances of its unlawful construction. Any present day deficiencies in the road will simply form part of the normal merit assessment of any relevant development application (or Part 5 assessment) and should be dealt with accordingly (for example, by way of a condition requiring that an identified deficiency be dealt with).

Please do not hesitate to contact me on (02) 8035 7858 if you would like to discuss this advice.

Yours sincerely

Aaron Gadiel
Partner
Accredited Specialist —Planning and Environment Law